HIPSTER ANTITRUST MEETS PUBLIC CHOICE ECONOMICS: THE CONSUMER WELFARE STANDARD, RULE OF LAW, AND RENT SEEKING

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I. INTRODUCTION

Hipster Antitrust, or the "New Brandeis Movement," (hereinafter "Hipster Antitrust") proposes to divorce antitrust law from economic analysis, to abandon the well-established consumer welfare framework that introduced the rule of law to antitrust, and to replace that standard with a vague and pliable socio-political approach. Hipster Antitrust claims the consumer welfare standard invites excessive corporate control over antitrust agencies and outcomes. Hipster Antitrust claims it would reduce corporate control over antitrust institutions and their decision-making by relaxing the constraints imposed upon them by the consumer welfare standard and simultaneously granting them greater discretion under a broader, multi-factored public interest test. The purpose of our paper is to explain why this claim fails as a matter of both history and economics. In doing so, we hope to more fully illuminate the benefits of the consumer welfare standard in bringing the rule of law to antitrust.

It is difficult to overstate the positive influence upon antitrust jurisprudence and enforcement caused by the introduction of the consumer welfare standard and rejection of the previous incoherent hodgepodge of socio-political goals governing antitrust. But in this paper we focus not upon the more general benefits of the consumer welfare standard — for example, substantive improvements that more precisely tailored the antitrust laws to condemn anticompetitive behavior and allow procompetitive behavior — but instead evaluate the narrower question of the relationship between the choice of antitrust standard and incentives to engage in rent-seeking behavior or to subvert the antitrust laws for special interests. Hipster Antitrust claims a vaguer standard would reduce those incentives and produce superior outcomes. We rely upon public choice economics, empirical evidence, and the history of antitrust under precisely such a standard to demonstrate this claim is false. Indeed, we claim that an increase in the vagueness of the standard increases incentives for rent-seeking activity.

A core insight of public choice economics is that individuals within government institutions, like all individuals, respond to incentives. The operation of those institutions during the era in which the Hipster Antitrust's preferred vague antitrust standards were in place provides a window to evaluate the claim that greater discretion leads to less risk of regulatory capture, subversion of the antitrust laws, and crony capitalism. Not surprisingly, an evaluation of the historical record and evidence shows that the introduction of the consumer welfare standard reduced incentives for rent seeking and brought the rule of law to antitrust.

The rule of law is essential to our legal system. It is a foundational principle. And one with myriad economic benefits arising both from the predictability of outcomes, as well as holding government agencies and actors accountable for their decisions. The benefits arising from the increase in predictability of antitrust outcomes has been explored at great length by antitrust scholars and practitioners and we do not repeat those arguments here.[2] We focus primarily upon the second point — the constraints that a meaningful and objective standard imposes upon agency behavior and upon incentives to subvert the antitrust laws for private gain.

Hipster Antitrust has raised several interesting and intellectually important challenges to the antitrust *status quo*. Each deserves to be taken seriously and evaluated on its merits. We share the concern that antitrust institutions might be used to promote corporate welfare instead of consumer welfare, and lead to subversion of the antitrust laws more generally. We explain here in economic, empirical, and historical terms why the Hipster Antitrust claim that rejecting the consumer welfare standard in favor of a broader and more pliable public interest standard would reduce that risk is incorrect.

2 Early antitrust decisions often articulated conflicting goals that made it difficult to predict whether, for instance, courts would apply the antitrust laws to protect competition or, instead, to protect competitors from competition. See, e.g. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699-700. (1967) ("[A] competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.").

II. PUBLIC CHOICE THEORY AND ANTITRUST

A. Fundamentals of Public Choice Theory, Rent Seeking, and Regulatory Capture

Public choice economics refers to economists' study of collective choice processes. At its core, public choice economics extends the traditional tools of microeconomic analysis — that is, the study of individual decision-making — to individuals operating government institutions, be they legislators, bureaucrats, or judges. The economic problem becomes how to "model the ways in which the diverse and often conflicting preferences of self-interested individuals get expressed and collated when decisions are made collectively."[3]

Public choice economics may be applied to explain why some government actions benefit certain interest groups at the expense of others, with a particular focus upon the political process.[4] Public choice also may be contrasted with "public interest theory." The latter presumes that while individuals act according to their own self-interest while behaving in their personal capacities, those same individuals act against their own self-interest and in accordance with the public interest — benevolently correcting the failures of private markets — while behaving as government employees.[5] Public choice theory, in contrast, recognized the oddity of presuming such vastly disparate motivations for precisely the same set of individuals, and challenged economists to use their traditional toolkit, focused upon individual decision-making, to analyze decisions within government institutions. It theorized, quite simply, that people are people, and that there exists a distinct lack of support for the notion that self-interested actors transform into substantially different creatures upon transitioning to their governmental capacities.[6] Under public choice theory, then, the government's part in the economy is another outcome "to be explained, not assumed."[7] Thus, the rise of public choice theory coincided with the intellectual development of the theory of economic regulation.[8]

The public choice approach, supplemented by empirical studies that firmly rejected the public interest theory of bureaucracy, helped explain the behavior of voters, bureaucrats, politicians, interest groups, and other political actors across a variety of non-market settings.[9] A primary insight of public choice's analytical framework is its theory of special interests and the process of rent seeking. For our purposes, economic rents, or returns in excess of a firm's opportunity cost, refer to those rents artificially created and awarded through government action.[10] Despite that these rents arise artificially (i.e. they are not derivative of natural market conditions), they are nonetheless subject to their own version of competition.[11] The process of pursuing these artificially created rents is commonly labeled "rent seeking," and entails significant societal costs.[12]

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3 Shughart II, *Public Choice,* Library of Economics and Liberty, http://www.econlib.org/library/Enc/PublicChoice.html.

4 Tollison, *Public Choice and Antitrust*, 4 Cato J. 905, 910 (1985). See also Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie,* 74 Va. L. Rev. 179, 180-81 (1988).

5 Tollison, supra note 4, at 905. See also Brennan & Buchanan, supra note 4.

6 Tollison, supra note 4, at 907. In short, public choice is "politics without romance." See Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in The Theory of Public Choice—II, 11 (Buchanan & Tollison eds. 1984).

7 Tollison, supra note 4, at 906.

8 See, e.g. Peltzman, *Toward a More General Theory of Economic Regulation,* 19 J.L. & Econ. 211, 212 (1976) ("[a] common, though not universal, conclusion has become that, as between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest."); Becker, *A Theory of Competition Among Pressure Groups*, 98 Q.J. Econ. 371 (1983); Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

9 See, e.g. Buchanan & Tullock, Calculus of Consent (1962); Niskanen, Jr., Bureaucracy and Representative Government (1971); Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291 (1974); Shughart & Tollison, *On the Growth of Government and the Political Economy of Legislation*, 9 L. & Econ. 111 (1986); Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. Econ. J. 224 (1967).

10 Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 575 (1982). Economic "rents" can also occur naturally in the price system due to events such as shifts in the demand or supply curves and, under these circumstances, pursuing rents is merely synonymous with profit seeking in the competitive process. Id.

11 Id.

12 Id. Tullock is largely credited with developing and popularizing the concept of rent seeking. See Tullock, supra note 9; Tullock, *Public Choice*, in 4 The New Palgrave: A Dictionary of Economics 147 (Eatwell, Milgate & Newman eds. 1987) [hereinafter Tullock, *Public Choice*]. However, Ann Krueger coined the term "rent seeking." See Krueger, supra note 9.

A quintessential rent-seeking example involves a domestic industry attempting to establish legislative or regulatory protection from foreign competitors.[13] A domestic industry in this scenario might donate to a politician's campaign to influence the politician's behavior, hire lobbyists to push domestic legislative bodies to adopt protective laws or rules, or employ lawyers to litigate, or to complain to government agencies about, a rival's allegedly unlawful behavior.[14]

Public choice labels such rent-seeking schemes as strictly wasteful because the process imposes significant costs upon society, regardless of whether the scheme is successful. If a rent-seeking scheme succeeds in raising legislative or regulatory barriers to entry, consumers will likely bear social costs similar to those associated with cartelization or price fixing.[15] When a government awards artificial rents, the beneficiary often gains the ability to price above competitive levels. Although such decisions result in net losses to society, private interests can successfully extract these rents because the benefits are concentrated among a small number of organized individuals while the costs are diffused across numerous consumers who individually lack the incentive to organize and protect themselves.[16]

But rent seeking is costly regardless of whether it succeeds because it always diverts resources that could be used in productive endeavors (and thereby increase welfare), toward efforts that merely capture a greater portion of existing welfare (i.e. simply transferring welfare).[17] For example, a firm facing a loss of sales to a rival could respond by taking a number of productive actions such as lowering prices, improving product quality, innovating, or increasing advertising.[18] However, the firm also could take non-productive actions like appealing to the government for protection via lobbying for legislation, influencing a regulatory ruling, initiating a lawsuit, or complaining to an agency.[19] Compounding these costs, many situations also encourage private parties to engage in defensive forms of rent seeking; for example, to prevent the government from stripping them of a privately-created rent or awarding an artificial rent to a rival.[20]

Ultimately, a firm's decision to engage in rent-seeking activity depends upon its expected return from such behavior. It is well understood that granting government institutions broader discretion over the creation and distribution of rents will increase the expected return to rent-seeking behavior.[21] The avenues through which a government institution — an antitrust agency, for example — might increase its discretion over the creation and distribution of such rents are many. An increase in the vagueness of a statutory mandate or rule simultaneously: (1) presents more avenues by which a firm can rent seek; and (2) diminishes the government agency's accountability to the public which might force the agency to internalize the costs of poor decision-making. Multi-factored, opaque rules provide greater discretion to government agencies and, accordingly, less certainty as to outcomes. This makes it easier for an agency to explain any given outcome and more difficult for a court or the public to hold that agency accountable for such decisions. Thus, vague rules will generally increase the overall level of rent seeking — along with its

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13 See Tullock, supra note 9.

14 Id. See also Tullock, *Future Directions for Rent-Seeking Research*, *in* The Political Economy of Rent Seeking 465, 466 (Rowley, Tollison & Tullock eds. 1988); DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 Harv. J. L. & Pub. Pol'y 205, 214-15 (1991).

15 See Debow, supra note 14, at 215; Tullock, supra note 9.

16 See generally Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups (1965); Mitchell, *Interest Groups: Economic Perspectives and Contributions*, 2 J. Theoretical Pol. 85 (1990); see also Debow, supra note 10, at 215-16.

17 See Debow, supra note 14, at 216; Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 Cato J. 431 (1987); Tollison, *Is the Theory of Rent-Seeking Here to Stay?*, in Democracy and Public Choice: Essays in Honor of Gordon Tullock 143, 145 (Rowley ed. 1987); Tullock, *Public Choice*, supra note 12. Some refer to these types of activities as "directly unproductive." See Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. Pol. Econ. 988 (1982).

18 Shughart & McChesney, *Public Choice Theory and Antitrust Policy*, 142 Public Choice 385, 398 (2010).

19 Id. at 399.

20 McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. Legal Stud. 101, 102-03 (1987).

21 The expansion of governmental power and discretion also introduces more uncertainty into the law, making estimations about the chances of winning or losing at trial more difficult. This would almost certainly increase the problem of "overinvestment" in non-productive rent seeking. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 Cal. L. Rev. 1, 4 (1980). For deeper discussions on examples of private abuse in the area of antitrust, see Greenhut & Benson, American Antitrust Laws in Theory and Practice 145-222 (1989); Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985); Hazlett, *Is Antitrust Anticompetitive?*, 9 Harv. J.L. & Pub. Pol'y 277, *319*-29 (1986); Miller III, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267 (1985).

commensurate societal costs.[22] Increased rent seeking can, in turn, increase the likelihood of what has been deemed "regulatory capture," that is, the phenomenon wherein government agencies charged with acting in the public interest instead act in the interest of the most vocal special interests before them, typically at the expense of the public at large.[23]

B. Public Choice Theory and Antitrust

While public choice theory's implications for antitrust are, at times, overlooked,[24] the ties between public choice theory and antitrust enforcement have been rigorously evaluated over the last more than 30 years.[25] The public choice literature relating to antitrust has focused upon a series of interrelated inquiries. *First*, which theory, public interest or public choice, better explains agency behavior? *Second*, and relatedly, what do specific studies tell us about actual antitrust agency behavior? *Third*, why might antitrust enforcement be particularly prone to rent-seeking behavior? And, *fourth*, if public choice theory is indeed the better fit, how can antitrust best achieve its objective of maximizing consumer welfare?

At the outset, it is important to note that before antitrust law fully embraced the consumer welfare standard, it sought to effectuate a number of vaguely articulated socio-political goals, such as preventing bigness and preserving "small dealers and worthy men."[26] As developed, public choice theory predicts such a regime, characterized by a vague mandate and boundless discretion by agencies, would be characterized by large amounts of rent seeking; whereas public interest theory predicts regulators would nonetheless act benevolently and in the public interest.

To the first insight — which theory better explains agency behavior — at least by 1985, prolific public choice economist Robert D. Tollison noted that "many critics have shown[] the historical record of antitrust decisions will not support the public interest theory."[27] Shughart and McChesney similarly explained that, around this time, "scholars who studied antitrust policymaking came away puzzled by evidence they uncovered pointing to a significant gap between the theory of antitrust — widely but not unanimously accepted as a policy tool meant to protect consumers against abuses of market power in the economy — and its application in actual law enforcement practice."[28] They elaborated that "outcomes of large numbers of antitrust cases brought by the U.S. Department of Justice's Antitrust Division [and] the Federal Trade Commission (FTC)" before about 1980 appeared "inconsistent with law-enforcement philosophy guided by a consumer-welfare standard."[29]

Second, during this time, the FTC was frequently and consistently condemned for ineffective enforcement efforts — which were typically at odds with consumer outcomes. For example, *The Nader Report on the Federal Trade Commission* highlighted the Commission's numerous failures, illuminating its inability to protect consumers and its particular tendency to respond to political pressures rather than consumer interests.[30]

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22 See Debow, supra note 14, at 222; Wright & Ginsburg, *The Economic Analysis of Antitrust Consents*, Euro. J.L. & Econ. (forthcoming 2018) ("Greater agency discretion over liability also may shift resources from productive uses to rent-seeking activities."). See also Sullivan, supra note 21.

23 Stigler, supra note 8; see also Olson, supra note 16.

24 See infra Part II; see also Shughart II & Tollison, *The Positive Economics of Antitrust Policy: A Survey Article*, 5 Int'l Rev. of Law & Econ. 39, 53 (1985) ("Antitrust is one of the few remaining areas in which it is commonly assumed that government operates in the public interest.").

25 Shughart & McChesney, supra note 18, at 388-91 (collecting literature and empirical studies testing the "consumer welfare" or public interest theory of antitrust and explaining the "puzzling inability of the consumer-welfare models to predict antitrust law enforcement activity"); Shughart, *Antitrust, Regulation and the Chicago School*, Oxford Business Law Blog (Feb 26, 2017) https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/antitrust-regulation-and-%E2%80%9C-chicago-school%E2%80%9D.

26 See, e.g. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699 (1967) (A "competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men"); *United States. v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945) (antitrust law exists to "put an end to great aggregations of capital because of the helplessness of the individual before them").

27 Tollison, supra note 4, at 905.

28 Shughart & McChesney, supra note 18, at 386.

29 Id.

30 Cox, Fellmeth & Schulz, The Nader Report on the Federal Trade Commission (1969).

Antitrust luminary Judge Richard A. Posner likewise noted in 1969 that the FTC was "rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized;" "lack[ed] both the incentives and the pressures to be efficient;" and that was, "all in all, inefficient and incompetent."[31]

Empirical studies of agency behavior and antitrust outcomes during antitrust's socio-political era reinforced that the antitrust agencies were not, in fact, seeking to maximize the public interest.[32] Long, Schramm, and Tollison, for instance, analyzed the role of economic criteria in antitrust enforcement, particularly, "to what extent industry welfare losses, and the components of welfare losses which measure the price of monopoly and the industry size, explain the historical distribution of antitrust cases [between 1945 and 1970] across different manufacturing industries."[33] Their study concluded that "economic variables may influence antitrust decisions," but that "all the models tested explain[ed] at best about 60 per cent of the variance in cases brought across industries."[34] In other words, measurable public interest factors failed to explain nearly half of DOJ antitrust decisions. Subsequently, Coate, Higgins, and McChesney specifically tested whether FTC decisions were influenced by pressure from Congress.[35] Their study found political pressure indeed led the Commission to challenge additional proposed mergers in 1982 and 1986.[36]

Again, such results were not only unsurprising, but largely predicted by public choice theory. As with other areas (potentially) impacted by government action, special interest groups have often used their powerful voices to affect antitrust enforcement.[37]

Third, public choice theory elucidates various factors that may contribute to rent seeking in the antitrust context. Some relate to traditional public choice insights regarding bureaucratic incentives. For instance, agency employees will generally seek to increase the importance of their agency and themselves — which often translates to more government activity intended to, among other things, justify higher budgets; carve out a larger jurisdictional territory; and, in many cases, maximize individual employees' exit options into the private sector.[38]

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31 Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 47, 87 (1969). Further, the Antitrust Section of the ABA likewise authored a critical report of the Commission around this same time. Report of the ABA Commission to Study the Federal Trade Commission (1969). As Judge Posner noted, these criticisms followed a long line of earlier criticisms of the Commission. Posner, supra, at 47 n.1.

32 See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365 (1970); Yandle, *Antitrust Actions and the Budgeting Process*, 59 Pub. Choice 263 (1988) (finding the "public interest hypothesis has not been supported by empirical work").

33 Long, Schramm & Tollison, *The Economic Determinants of Antitrust Activity*, 16 J.L. & Econ. 351, 351, 365 (1973).

34 Id. at 362.

35 Coate, Higgins & McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & Econ. 463 (1990).

36 Id. at 465, 481-82. The authors further explained that their "political variables may understate the FTC's overall susceptibility to political considerations. The sample does not include attempts to merge that would have occurred but for parties' perception that merger would be unacceptable politically." Id. at 477-78. Notably, this study also found factors articulated in the 1982 Horizontal Merger Guidelines also impacted Commission decisions. Id. at 481. See also Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. Pol. Econ. 884 (1986); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking at the Federal Trade Commission*, 91 J. Pol. Econ. 765 (1983).

37 The Robinson-Patman Act prohibits price discrimination and was specifically designed to protect smaller retailers from the competitive pressures exerted by larger (often chain) stores that could otherwise obtain significant bulk discounts. See Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. & Econ. 243 (1984). While it is widely recognized today that the Robinson-Patman Act does more harm than good by preventing such healthy competition, Tollison has explained that Robinson-Patman "is not a mistake of antitrust policy but a rationally designed law to buffer certain firms against losses." Tollison, supra note 4, at 911; see also Armentano, Antitrust and Monopoly: Anatomy of a Policy Failure 167-92 (1982); Bork, The Antitrust Paradox: A Policy at War with Itself 382 (1978); Blair & DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J.L. & Econ. 201, 201-02 (2014).

38 See Posner, supra note 31, at 85-86 ("George J. Stigler proposes as a reasonable assumption that regulators act so as (to) retain their jobs and (b) to obtain greater appropriations for their agency as a way of increasing personal power (and frequently remuneration as well). This assumption seems reasonable in regard to commissioners who seek reappointment and those staff members who make a career of government service. The self-interest of such individuals would appear to dictate the avoidance of controversy and the conciliation of well organized economic interests and influential Congressmen. . . . A commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement. He will receive no bonus upon entry (or reentry) into private practice for the vigorous championing of the consumer interest. . . . On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests would engender may do him some later harm, while making his tenure with the Commission more tense and demanding than would otherwise be the case."); Shughart II, *Don't Revise the Clayton Act, Scrap It!*, 6 Cato J. 925, 928 (1987) ("Bureaucratic incentives run strongly in the direction of producing visible output . . . The more work there is for government, the more opportunities there are for the attorney staff to build the human capital that is rewarded when they subsequently take jobs in big antitrust law firms, and the larger and more secure are the antitrust bureaus.").

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.[39] Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys' fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant's ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival's resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.[40]

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.[41] The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

This historical context of the performance of antitrust institutions during the era of vague and multi-factored antitrust standards is critical to understanding contemporary proposals to revolutionize antitrust law and enforcement. Those proposals have claimed, counter to economic logic and historical evidence, that a return to the socio-political era of antitrust would bring a decrease in rent seeking. Our goal here is to explain why those claims are false. The consumer welfare standard provided antitrust law a correction that reduced subversion of the antitrust laws to serve corporate interests rather than consumer welfare. Modern critics of the consumer welfare standard argue the opposite. But the history of the antitrust enterprise tells a different tale. Today, there is wide, bipartisan agreement that the consumer welfare standard transformed antitrust law for the better.[42] It offers an economically-grounded framework for analyzing enforcement actions, and clear criteria the agencies (and private plaintiffs) must demonstrate to prove an antitrust violation. The consumer welfare standard thus was key to bringing the rule of law to antitrust. In doing so, the consumer welfare standard hampers rent-seeking efforts — which, in turn, has brought more clarity and consistency to antitrust outcomes.

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39 See Baumol & Ordover, supra note 21, at 252-56.

40 See Baumol & Ordover, supra note 21, at 254-55 (explaining why "vagueness of antitrust criteria" contribute to rent seeking, and noting "obscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition"); Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 Harv. J.L. & Pub. Pol'y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases."); Shughart & McChesney, supra note 18, at 389 ("Coupled with the large number of scholarly journal articles and books conducting and reporting on postmortems of individual antitrust cases, the empirical literature pioneered by Long et al. (1973) made it obvious that, whatever good intentions Congress may have had in passing the Sherman, Clayton and FTC acts, the enforcers of those laws were motivated by something other than the welfare of consumers.").

41 See, e.g. Baumol & Ordover, supra note 21, at 254-55 ("[T]he Areeda-Turner test [for predatory pricing] . . . seems to us certainly to have made a critical and beneficial contribution simply by reducing vagueness in the criterion of predation in pricing. This makes protectionist misuse of the antitrust laws much less easy."); Coate, Higgins & McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & Econ. 463, 470, 481-82 & n.43 (1990) (explaining that the Horizontal Merger Guidelines help to constrain the influence of political considerations on antitrust outcomes).

42 See, e.g. Ginsburg, supra note 40, at 222 ("There is now broad and nonpartisan agreement in academia, the bar, and the courts regarding the importance of sound economic analysis in antitrust decision making."); Averitt & Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175, 177 (2007) (describing the antitrust paradigm of the 1960s and 1970s as "standardless and unduly hostile to business" and the consumer welfare standard as "an immense improvement" over the big is bad era); Deborah Garza, Deputy Asst. Att'y Gen., Antitrust Division, The Modernization of Antitrust Law – Private and Public Enforcement and Abuses – Europe and the U.S., Remarks Before The Stanford Institute of Economic Policy Research (May 29, 2008), https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and ("Even the most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning . . . . We won't return to what antitrust enforcement looked like 40 years ago.").

III. HIPSTER ANTITRUST AND RENT-SEEKING INCENTIVES

A. Key Tenets of Hipster Antitrust

Hipster Antitrust comes in a wide variety of shapes and flavors but ultimately can be summarized by one unifying theme: the rejection of the consumer welfare standard in favor of vague social and political goals that elevate normative views about market structure over modern economic theory and empirical evidence.[43] To accomplish this goal, Hipster Antitrust attempts to capitalize on current populist sentiments to lure supporters with rhetoric drawing parallels between the trusts of the late 19th and early 20th centuries and the modern U.S. economy. While laying a myriad of societal ills at the feet of modern antitrust jurisprudence, Hipster Antitrust seeks, through nostalgic reflex, for antitrust law to become a central tool for carrying out a new wave of government intervention not seen since the New Deal. In doing so, Hipster Antitrust purports to offer a progressive vision, but one that ironically completely ignores the significant progress made in industrial organization economics over the past century and threatens to send antitrust policy careening back to the field's equivalent of the Stone Age.[44] This untethering of antitrust from the consumer welfare standard and modern economics not only would significantly increase errors in antitrust outcomes, but maybe more significantly, also would weaponize antitrust as a political and regulatory tool that encourages rent seeking and ultimately corporate welfare.

While Hipster Antitrust undoubtedly starts from a place of noble intentions and an alluring desire to promote democratic goals central to our nation's founding, it ultimately falls wide of the mark — and regrettably actually threatens to harm our institutions — by ignoring the lessons of antitrust's past, advances in economic learning, and incentives inherent in democratic decision-making structures. To better understand the flaws inherent in Hipster Antitrust, it is useful first to examine in more detail its central tenets and key policy proposals.

Dismantling the Consumer Welfare Standard: It is easy to forget that antitrust once was regarded as an incoherent body of law that was internally inconsistent and unprincipled.[45] Antitrust struggled with seemingly basic concepts, such as whether it should protect competition or whether it should protect competitors *from* competition. The arbitrariness of antitrust enforcement decisions during this time was so significant that one Supreme Court justice remarked: "The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins."[46] It is the consumer welfare standard that offered a way out of the quagmire. Born out of considerable debate, the consumer welfare standard provided antitrust with a disciplined method of analyzing competition that starts and ends with the straightforward question: "Is the challenged conduct likely to make consumers better or worse off?" The consumer welfare model further called upon courts and enforcers to rely on an error-cost framework and the latest economic evidence in assessing whether the challenged conduct harms consumers.[47]

Hipster Antitrust rejects the consumer welfare standard.[48] This hostility stems from a belief that the consumer welfare standard focuses narrowly only on short-term price effects and thus has dramatically weakened antitrust enforcement below some perceived optimal level. Hipster Antitrust proponents argue that, but for the consumer welfare standard, antitrust could be unleashed to challenge the many monopolistic prac-

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43 See, e.g. *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Sen. Jud. Comm.* (2017) [hereinafter *Consumer Welfare Hearing*] (statement of Barry Lynn), available at: https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf; Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 *J. Eur. Comp. L. & Practice* 131, 131-32 (2018) [hereinafter Khan, *The New Brandeis Movement*]; Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017); Khan & Vaheesan, *Market Power and Inequality, The Antitrust Counterrevolution and its Discontent*, 11 Harv. L. & Pol'y Rev. 234 (2017); Rahman & Khan, *Restoring Competition in the U.S. Economy,* in Untamed: How to Check Corporate Financial and Monopoly 18-25 (2016); Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016).

44 See Kovacic & Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (2000).

45 See Bork, supra note 37, at 7-8; Averitt & Lande, supra note 42, at 178; Ginsburg, supra note 40, at 217; Wright & Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 2013 Fordham L. Rev. 2405-06 (2013).

46 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

47 See generally Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 15–16 (1984); Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 Antitrust L.J. 301, 303-09 (2011).

48 See, e.g. *Consumer Welfare Hearing*, supra note 43 (statement of Barry Lynn) ("I believe we must formally abandon the 'Consumer Welfare' philosophy…"); Khan, *The New Brandeis Movement*, supra note 43 (arguing that the consumer welfare standard has "blinded enforcers to the many harms cause by market power").

tices that have been allowed to run rampant in the U.S. economy.[49] Putting aside whether the underlying facts support the notion that there is a broader competition problem in the U.S. today, in attacking the consumer welfare standard, Hipster Antitrust both fails to understand the robust economic analysis called on by the consumer welfare framework and, as is discussed below, neglects to offer an alternative standard that would keep antitrust from once again vacillating between conflicting goals.

Adopting a Vague, Multi-Prong "Public Interest" Standard: The closest that Hipster Antitrust comes to offering a framework to replace the consumer welfare standard is its proposal to adopt a "public interest" standard.[50] Indeed, in contrast to the common law development of the consumer welfare standard, some have called for Congress to amend the antitrust laws to formally adopt the "public interest" standard. The public interest standard purports to employ a more comprehensive approach to antitrust analysis that would allow courts and enforcers to consider a broader range of non-price effects arising from challenged transactions and business practices. Although the precise contours of the public interest standard remain vague, among the expanded list of items that could be considered as part of antitrust in a public interest regime are at least the following factors: income inequality, unemployment, worker mobility, wage disparities, political influence, and small business formation and growth.[51] In promoting the public interest approach, Hipster Antitrust seeks to make antitrust a vague and malleable regulatory regime that can be used to implement a broad range of policy preferences with little, if any, limiting principles on those who happen to be charged with wielding the newfound power.

Focusing Antitrust on Attacking Market Structure: Hipster Antitrust claims as a key influence the thinking of former Supreme Court Justice Louis Brandeis, who famously described the U.S. economy of the early 19th century as being beset by the "Curse of Bigness."[52] It is therefore no surprise then that Hipster Antitrust seeks to return antitrust to a bygone era when courts and enforcers focused narrowly on market structure rather than on actual anticompetitive effects to determine whether a transaction or business practice should be challenged under the antitrust laws.[53] Although economic learning has moved antitrust well beyond the attractively simplistic method of counting the number of firms to assess the likelihood of competitive harm,[54] Hipster Antitrust seeks for courts and enforcers to do just that by using concentration (however defined) as a proxy for a significant reduction in competition that would result in the host of socio-political ills implicated by the public interest standard.[55]

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49 See, e.g. Rahman & Khan, supra note 43 (arguing that the Consumer Welfare standard has "in practice worked to narrow and weaken antitrust enforcement").

50 See, e.g. id. at 23 (arguing that the antitrust laws should be amended to adopt a broader "public" or "citizen" interest standard); Warren, supra note 43 ("Proposals include adopting a public interest standard for enforcement actions, placing the burden on merging companies to prove mergers will not harm competition, and requiring agencies to release more information about their enforcement actions.").

51 See, e.g. *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, DemocraticLeader.gov: A Better Deal 1 (2017) [hereinafter *A Better Deal*], http://abetterdeal.democraticleader.gov/wp-content/uploads/2017/10/A-Better-Deal-on-Competition-and-Costs.pdf ("The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.").

52 Khan, *The New Brandeis Movement*, supra note 43; see also Brandeis, The Curse of Bigness (Fraenkel ed. 1934). Ironically, Hipster Antitrust also claims a lineage to James Madison, who famously recognized, even at the time of the founding, many of the public choice concerns that arise when institutions are weakened to allow interest group influence and rent seeking. See, e.g. The Federalist No. 51 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

53 Under this former approach, transactions creating a firm with a combined share as low as 8 percent were prohibited despite the lack of any market power, leaving no merger safe from challenge under the antitrust laws. See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

54 See Ginsburg & Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201, 201-02 (2015). Hipster Antitrust goes further than the structural presumption articulated in Supreme Court precedent in that it claims not only that structure is the starting point for assessing actual competitive effects (and tips the scales in favor of the government), but that identifying the "correct" market structure is itself the key purpose of antitrust, regardless of actual effects.

55 See Khan, *The New Brandeis Movement*, supra note 43 (arguing that antitrust "must focus on structures and process of competition, not outcomes"); *Consumer Welfare Hearing*, supra note 43, at 13 (statement of Barry Lynn) (advocating for returning to the "previous approach to antitrust" that focused "foremost on the making and maintenance of 'market structures' designed to prevent concentration of power and to keep markets open and competitive."). For a discussion of how antitrust analysis has moved from a simplistic focus on structure to a robust effects-based analysis, see Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 72 (2010).

This "big is bad" mentality reminiscent of antitrust policy prior to the economics revolution that began in the 1970s, has motivated a general hostility to mergers (as all horizontal mergers, regardless of share, will lead to some increase in concentration) that has been embodied in specific legislative proposals. As part of its new policy platform, the Democratic Party has proposed to revise the antitrust laws to target not merely concentration, but corporate growth regardless of the effects on competition.[56] Democrats also have introduced new legislation that proposes to make all mergers over a certain dollar value presumptively unlawful (regardless of whether the merging firms have any competing businesses) and to require merging firms to bear the burden of proving that the proposed transaction not only will not harm competition, but that it will affirmatively benefit consumers.[57] In doing so, the proposed legislation would provide antitrust authorities with significant leverage and, coupled with a new public interest standard, broad discretion to decide which business ventures the government should permit.

Hipster Antitrust seeks to fundamentally alter antitrust law by shifting it away from the consensus consumer welfare standard that has been carefully developed over the last 50 years to make antitrust a productive part of society. Hipster Antitrust seeks to replace the current model, which is tethered to the common language of modern economics, with vague socio-political goals and a "big is bad" opposition to corporate growth, regardless of competitive effects. This shift away from economics and an objective welfare standard, not only would lead to increased error in individual cases, but as is discussed in the next section, it also would weaken antitrust institutions and encourage rent seeking by blurring the contours of antitrust liability rules.

B. Hipster Antitrust Would Increase Rent Seeking and Corporate Welfare

1. Vague Standards and Broad Discretion Invite Rent Seeking

A key feature of modern antitrust jurisprudence is that the consumer welfare standard provides a disciplined and objective framework for courts and enforcers to assess whether a transaction or business practice is likely to harm competition and violate the antitrust laws. Although there inevitably will be debate and advocacy in cases that fall on or near the margins, the contours of the consumer welfare standard have been developed through decades of case law and today are well established.[58] It is well understood by courts, enforcers, businesses, and practitioners what types of harms fall inside or outside of the antitrust laws and the types of evidence that are useful for discerning whether a violation has occurred. Stated simply, conduct that results in anticompetitive effects, such as higher prices, lower output or quality, or decreased innovation, is unlawful. Conduct that results in procompetitive benefits, or that is competitively neutral, is not. The consumer welfare standard thus provides businesses with important guidance about the types of conduct that are lawful and unlawful. More critically, though, the consumer welfare standard promotes the rule of law and decreases opportunities for rent seeking by cabining the discretion of the courts and enforcers.[59]

The well-established contours of the consumer welfare standard prevent against the arbitrary exercise of legal power, and ultimately the misuse of the antitrust laws, by limiting the ability of politics and interest groups to meaningfully influence individual antitrust outcomes. Public choice theory teaches that implementing such institutional safeguards is critical to ensuring that law and regulation are more likely to promote the public good rather than the interests of individual actors. Calls to replace the consumer welfare standard with a new "public interest" test would undo this key institutional protection and open the door to rent seeking by interested parties and, ultimately, create an antitrust regime that focuses on corporate welfare rather than consumers. Because the public interest standard consists of a test with multiple vague and potentially conflicting factors, enforcers (and private plaintiffs) would have little difficulty justifying nearly any antitrust challenge, including those advocated by firms seeking to gain a regulatory advantage against a competitor. Even in cases where the challenged conduct implicates conflicting factors, such as reducing employment by preventing store expansions but thereby also promoting the growth of local and small businesses, the public

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56 *A Better Deal*, supra note 51; see also Crane & Schrepel, *The Democrats' "Better Deal" is Neither Better nor a Deal*, NYU J. L. & Bus. (forthcoming Nov. 2017).

57 See Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017).

58 For a discussion of the common law method to developing antitrust rules in the context of the Federal Trade Commission's authority under Section 5 of the FTC Act, see Rybnicek & Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo. Mason L. Rev 1287 (2014).

59 Some commentators believe that the DOJ's lawsuit seeking to block AT&T's acquisition of Time Warner is an unsavory example of politics (rather than substance) determining whether the government pursues an antitrust enforcement action. See, e.g. Kendall & FitzGerald, *Justice Department Files Lawsuit Challenging AT&T Time Warner Deal*, Wall St. J. (Nov. 20, 2017), https://www.wsj.com/articles/justice-department-expected-to-file-lawsuit-challenging-at-t-time-warner-deal-1511210955. We have no reason to believe that politics was involved in the DOJ's decision but, more importantly, conclude that the combination of an independent arbiter and the consumer welfare standard, properly applied, ensures that the case will succeed or fail on the merits, that is to say, whether there is evidence that consumers are likely to be harmed.

interest standard allows enforcers (and private plaintiffs) to decide which factor they consider most important at that time to justify the challenge. The public interest standard thus would undermine the rule of law and grant new power to corporations seeking to sway enforcers in an effort to gain regulatory rents.

Calls to make large mergers presumptively unlawful and to focus antitrust analysis on market structure rather than actual anticompetitive effects similarly opens the door to rent seeking and, ultimately, corporate welfare. It is well known that proving procompetitive benefits in merger litigation is exceedingly difficult.[60] In fact, there exists no merger case in which a court has ultimately concluded that procompetitive benefits outweigh the anticompetitive harms alleged by the government. Should merging parties be required to prove procompetitive benefits in order to receive permission to complete their transaction, enforcers likely could prevent any merger they decide to oppose. As the case law shows, courts rarely would conclude that the merging parties have carried their burden of proving, with the required high degree of certainty, that a transaction generates procompetitive benefits. The result would be that enforcers would gain broad discretion to oppose nearly any transaction, which in turn would leave them susceptible to rent seeking by corporations hoping to impose new regulatory burdens on their competitors. Furthermore, as we have seen in antitrust's past, elevating a focus on market structure and deconcentration over actual anticompetitive effects would allow enforcers to successfully oppose even transactions resulting in a firm with a combined share in the single digitals.[61] As with putting the onus on merging parties to prove with certainty future procompetitive benefits, allowing enforcers to rely on market structure (which always will be more concentrated following a horizontal merger) would give enforcers broad discretion to decide which transactions should be permitted to close. Public choice theory teaches that such vague standards and broad discretion lead government agencies to stray from their public mission and to become susceptible to rent seeking.

Moreover, a new public interest test would take years to deploy and even longer before meaningful guidance could be issued similar to that which the consumer welfare standard offers today. In the meantime, firms could use the new standard as leverage over the antitrust agencies. Once allowed to influence agency enforcement practices during the initial period when no framework exists, it will be difficult to establish guidelines that do not leave room for such manipulation to continue. By calling to replace the consumer welfare standard with a vague multi-factored public interest test and elevating a focus on market structure over the application of economic theory and empirical evidence to determine actual anticompetitive effects, Hipster Antitrust ironically would grant large, powerful corporations the ability to exert undue influence over the decision-making process at the antitrust authorities, all to the detriment of consumers.

2. Hipster Antitrust Ignores Prior Experience with Vague Standards

The hazards inherent in vague liability standards are not merely theoretical and, regrettably, not unprecedented in the U.S. experience. Hipster Antitrust ignores the lessons gleaned from prior pursuits of lofty, but fantastical, standards that aim to put public servants, as dedicated as they may be, in the position of ignoring their own individual preferences and instead promoting some malleable notion of public interest. The Federal Communication Commission's ("FCC") bleak history of attempting to employ a public interest approach is particularly instructive and should cause policy makers to be skeptical that abandoning the consumer welfare approach to antitrust in favor of a vague new public interest test will do anything other than cause significant harm.[62]

The FCC's public interest standard has been aptly summarized by Ronald Coase, who observed nearly 60 years ago that "the phrase [public interest] . . . lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation."[63] In the absence of a clearly articulated framework demarcating the boundaries of the public interest standard, the FCC has been able to apply the public interest test broadly to evaluate a multidimensional set of

60 See generally, Crane, *Rethinking Merger Efficiencies,*110 Mich L. Rev. 347 (2011) (discussing the greater proof required to substantiate efficiencies claims than to prove potential anticompetitive harms).

61 See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966).

62 Chairman Ajit Pai has taken important steps to attempt to tether the FCC's public interest standard to economics in an effort to align the agency's enforcement framework more towards an objective cost-benefit analysis resembling the approach used in antitrust. In particular, on January 30, 2018, the FCC created a new Office of Economics and Analysis to achieve a more systematic and regular vetting of proposed policies and rules, a role similarly carried out today by economists at the DOJ and FTC. Fed. Comm. Comm'n, FCC 18-7, Order for the Establishment of the Office of Economics and Analytics (2018).

63 Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1, 8-9 (1959).

factors and to reach almost any result desired in a particular case.[64] As Tom Hazlett has noted, "because a public interest explanation can easily be manufactured, regulators are free to promote economic transfers to members of a prevailing coalition."[65] Hazlett argues that the "pliability [of the public interest standard] yields political advantages to policy makers and influential interest groups," resulting in a scenario where "consumer interests are dependably eclipsed by special interests."[66] These observations are shared across the political spectrum.[67]

The history of the FCC is littered with examples of potential rent seeking and regulatory capture made possible by the indeterminate nature of the public interest standard. For instance, observers have noted that broadcasters long sought and obtained regulatory protection from the FCC, which "suppress[ed] the cable industry by preventing direct competition between cable, and over-the-air broadcasting" and likely also significantly stifled innovation.[68] More recently, the debate over whether the FCC should impose net neutrality regulations have generated significant interest from industry participants hoping to extract rents by burdening their competitors.[69] Such regulations would benefit corporations at the expense of consumers, by discouraging investment and reducing the type of innovation that has allowed the Internet to flourish.[70]

The pliable nature of the public interest standard can be examined in the application of the FCC's merger review authority. For instance, in the Sirius-XM transaction, the FCC allowed a merger between the only two satellite radio companies because the FCC determined that monopoly ownership of satellite radio would be in the public interest.[71] The FCC brokered an agreement that required Sirius-XM not to increase the price on the basic subscription package for three years.[72] Sirius-XM responded a year later by raising prices twenty-eight percent on customers with multiple accounts, and adding a new three dollar per month charge for the online version of satellite radio, which was formerly free.[73] It is unclear what, if any, level of effects analysis the FCC conducted to conclude that a monopoly satellite radio company would sufficiently compete with traditional radio such that consumers would not be harmed, but the absence of an objective economics-based framework allowed the FCC to forgo such a rigorous analysis.

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64 See Thierer, Media Myths: Making Sense of the Debate Over Media Ownership, 97-100 (2005); Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose,* in A Legislative History of the Communications Act of 1934 3, 14 (Paglin ed., 1989) (describing the public interest standard as "vague to the point of vacuousness, providing neither guidance nor constraint on the agency's action"); Brotman, *Revisiting the Broadcast Public Interest Standard in Communications Law and Regulation*, Brookings (Mar. 23, 2017), https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation; Sallet, *FCC Transactional Review: Competition and the Public Interest,* FCC Blog, (Aug. 12, 2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest (noting "the 'public interest' standard is not limited to purely economic outcomes").

65 Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 Harv. J.L. & Tech. 335, 403 (2001). Hazlett also cites to the memoir of long-time FCC attorney William B. Ray, who recalls staff being asked to articulate public interest justifications for agency actions after the decision had been made to pursue the agency action. See Ray, FCC: The Ups and Downs of Radio-TV Regulation 44-45 (1990).

66 Id. at 402-03.

67 See, e.g. Wu, The Master Switch: The rise and Fall of Information Empires 308 (2010) ("Again and again in the histories I have recounted, the state has shown itself an inferior arbiter of what is good for the information industries. The federal government's role in radio and television from the 1920s through the 1960s, for instance, was nothing short of a disgrace . . . . Government's tendency to protect large market players amounts to an illegitimate complicity . . . [particularly its] sense of obligation to protect big industries irrespective of their having become uncompetitive.").

68 Kellogg, Thorne & Huber, *Federal Telecommunications Law 689* (Little Brown & Co. ed., 1992); see also Thierer, *Is the Public Served by the Public Interest Standard*?, Found. for Econ. Educ. (Sept. 1, 1996), https://fee.org/articles/is-the-public-served-by-the-public-interest-standard/.

69 See, e.g. Litan & Singer, *Why Business Should Oppose Net Neutrality*, Brookings (Aug. 10, 2010) https://www.brookings.edu/opinions/why-business-should-oppose-net-neutrality/ ("It would mean that no enhanced service offerings would be permitted unless an ISP could prove that it was not discriminating. Imagine the rent-seeking behavior that such a provision would encourage, as ISPs would be forced to go to the FCC on bended knee to seek an exemption from the general ban!").

70 See generally Hazlett & Wright, *The Law and Economics of Network Neutrality*, 45 Ind. L. Rev. 767 (2012).

71 Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, MB Docket 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12349 (2008).

72 Paul, *Sirius XM to Raise Some Prices as Debt Looms*, Reuters (Jan. 21, 2009), https://www.reuters.com/article/us-siriusxm/sirius-xm-to-raise-some-prices-as-debt-looms-idUSTRE50K63V20090121.

73 Id.

Similarly, by giving the FCC unbound flexibility to identify potential problems with a transaction, the public interest standard allows the FCC to use its merger review power to impose "one-off company restrictions that the FCC could not impose through ordinary regulatory processes."[74] For example, when the FCC approved AT&T's acquisition of MediaOne in 2000, the agency declined to condition the merger on an agreement to provide access to proprietary content, instead claiming that an aggrieved party should seek relief "through the generally applicable program access rules."[75] But, four years later when reviewing NewsCorp's acquisition of DirecTV, the FCC required the merged firm to comply with conditions that were more stringent than were required by the program access rules.[76] These restrictions had no apparent connection to the transaction or enhancing consumer welfare, and instead amounted to a cheap consent easily obtainable by the FCC as a result of the legitimate threat to block the transaction.[77]

Today the antitrust agencies are well-insulated from rent-seeking behavior and the influence of the corporations that fall within their jurisdiction because the agencies ultimately must apply a well-defined and objective economics-based framework to prove a violation of the antitrust laws. Dismantling the consumer welfare standard in favor of a vague new public interest test, and increased agency discretion in the form of placing the burden on merging parties to show that a transaction is procompetitive, would significantly increase the agencies' ability to justify nearly any enforcement decision. The absence of institutional safeguards that ensure meaningful accountability and cabin agency discretion inevitably would lead to increased opportunities for rent seeking and, ultimately, agency focus on corporate welfare rather than consumers.

IV. CONCLUSION

The risk of regulatory capture, rent seeking, and subversion of the antitrust laws to serve corporate welfare rather than consumer welfare are important concerns in the modern debate over the appropriate scope of the antitrust enterprise. Both Hipster Antitrust and its critics share these concerns and believe they lead to less desirable outcomes. In this paper, we explain how the consumer welfare standard introduced the rule of law to antitrust and its role in both reducing opportunism by antitrust institutions and weakening incentives for rent seeking. A lesson of the American antitrust experience with the sort of vague and unbounded standard desired by Hipster Antitrust is that it resulted in a dramatic increase in corporate and political influence over antitrust agencies. Public choice economics, empirical evidence, and history teach that an increase in regulatory discretion — such as the one that would follow from the rejection of the consumer welfare standard — would inevitably result in an antitrust regime that favors corporate welfare over consumer welfare, increases the risk of regulatory capture, and undermines the rule of law.

74 Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 Rev. Ind. Organ. 295, 312 (2014).

75 Id. See also Skorup & Koopman, *How FCC Transaction Reviews Threaten Rule of Law and the First Amendment* 15 (Mercatus Ctr. Working Paper, May 2016), https://www.mercatus.org/system/files/Skorup-FCC-Transaction-Reviews-v1.pdf. The FCC was also able to cap a cable company's market share at thirty percent by making that a condition of this merger. This regulation was later struck down. *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

76 See Yoo, supra note 74, at 312.

77 Id.